

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TRAVIS L. EDWARDS**

Claimant

VS.

**U.S.D. #259**

Self-Insured Respondent

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Docket No. 1,003,089

**ORDER**

Claimant requests review of the January 27, 2004 Order entered by Administrative Law Judge Jon L. Frobish.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant's back complaints were not a natural consequence of the injury he suffered working for respondent but were instead related to his work for a subsequent employer.

The claimant requests review of whether his current back complaints are the natural and probable consequence of the original accident claimant suffered working for respondent or whether claimant has suffered an intervening accident working for a subsequent employer.

Respondent argues the Board does not have jurisdiction because there was no transcript of proceedings prepared and no record exists for review. In the alternative, respondent argues claimant's current symptoms are the result of an intervening accident claimant suffered while working for a different employer. Consequently, respondent requests the Board to affirm the ALJ's Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The respondent's brief indicates and the administrative file confirms that there is no transcript of proceedings. The ALJ's January 27, 2004 Order was entered after a discussion between court and counsel which was apparently conducted by telephone conference. There is no indication that a record was requested by any party at the time. Although no exhibits were entered into evidence it appears from the arguments in the

parties' briefs to the Board that a court-ordered independent medical examination conducted by Dr. Henry D. Do was discussed. In addition, there is no stipulation by counsel concerning the substance of the evidence, arguments or testimony, if any, offered to the ALJ upon which his decision was based.

K.S.A. 44-555c(a) (Furse 2000) confers upon the Board the authority to review "all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. **The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.**" (Emphasis added).

The standard of review for the Board in a workers compensation case is the same as that conferred under prior law upon the district court. This standard was restated in *Miner v. M. Bruenger & Co.*, 17 Kan. App. 2d 185, 188, 836 P.2d 19 (1992), as follows:

The standard of review in workers compensation cases is well settled. Kansas case law allows the district court a trial de novo on the record and, although the court is bound by the agency record, the district court has the jurisdiction and the duty to make an independent adjudication of the facts and the law. *Reeves v. Equipment Service Industries, Inc.*, 245 Kan. 165, 171, 176, 777 P.2d 765 (1989). The district court has full power to grant or refuse compensation and to increase or diminish any award as justice requires. See *Gawith v. Gage's Plumbing & Heating Co., Inc.*, 206 Kan. 169, 171, 476 P.2d 966 (1970).

In this case, there is no agency record for the Board to review. K.S.A. 44-501(a) (Furse 2000) provides that the burden of proof is upon the claimant to establish his or her right to an award of compensation. However, it is the duty of the aggrieved party to request a record for appellate review purposes. In the absence of a record, the Board has no way of ascertaining what support there is for the ALJ's factual findings and legal conclusions, nor is there any feasible method for conducting an independent review of the evidence. We simply have not been furnished with any evidence from which the issues presented can be reasonably resolved.

Herein, the record provided to the Board consists of the parties' briefs. Briefs assist the Board in defining and focusing on the pertinent facts and law that a party considers significant to the determination of the appeal. But a brief is not evidence. It is simply a document that states a party's position on the facts and law pertaining to a specific issue.

The Board has the statutory authority to remand this matter to the ALJ with directions to put into evidence that testimony which counsel represented would be forthcoming if a hearing were held and upon which the ALJ based his decision. However, there is no indication in this case that either party was denied the ability to make a record.

The failure to request a record at the hearing constitutes a waiver of the right to object to the lack of a record.<sup>1</sup>

As we have stated, the responsibility for making a record rests with the aggrieved party. In the absence of such a request having been made by the claimant, the Board considers it inappropriate to remand the matter for such proceedings to be conducted at this juncture. The claimant's application for review should instead be dismissed for failure to furnish an adequate record, thereby making review by the Board impossible.

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Jon L. Frobish dated January 27, 2004, is hereby dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2004.

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BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant  
Gary K. Albin, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>1</sup> *In re Marriage of Soden*, 251 Kan. 225, 834 P.2d 358 (1992).